

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a forty-one percent (41%) work disability. The respondent and insurance carrier contend there should be a presumption of no work disability because claimant would have been returned to his former job earning a comparable wage but for an economic layoff. Nature and extent of disability is the only issue before the Appeals Board upon this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge should be affirmed in all respects. Because the findings and conclusions of the Administrative Law Judge are correct and proper, they are adopted for purposes of this review to the extent they are not inconsistent with those specifically set forth below.

A detailed recitation of the facts is unnecessary. Claimant injured his back while working for the respondent on April 3, 1992 while he and a co-worker were lifting a one-hundred and fifty (150) pound tool jig. An MRI taken shortly thereafter confirmed three level disc disease and herniation in the lower lumbar spine at the L3-4, L4-5, and L5-S1 intervertebral levels. As a result of his injury, claimant experiences residual neuropathy manifested by persistent weakness and numbness in the left leg. Claimant's left calf has also atrophied.

The parties presented the testimony of two physicians to establish the nature and extent of the claimant's injuries. Claimant presented the testimony of Wichita physician, Ernest R. Schlachter, M.D. As a general physician and former company doctor of various business concerns, Dr. Schlachter has experience in the evaluation and treatment of employees suffering from occupational injuries. Dr. Schlachter diagnosed the claimant as having three level disc disease with residual neuropathy. The doctor believes the claimant has experienced a twenty-five percent (25%) permanent partial impairment to his body as a whole as a result of the accidental injury. Dr. Schlachter placed the claimant on permanent limitation of no lifting greater than thirty (30) pounds on any occasion, no repetitive lifting greater than twenty-five (25) pounds, no repetitive bending, twisting or working in awkward positions. Ideally, claimant should find a job where he is able to sit part-time and stand part-time.

The respondent presented the testimony of Wichita orthopedic surgeon, Stephen Ozanne, M.D. Dr. Ozanne began treating claimant on May 27, 1992, when he was consulted for a second opinion. Dr. Ozanne believes claimant has two bulging discs and a small herniated disc at L4-5. As a result of his injuries, Dr. Ozanne believes claimant has experienced a nine percent (9%) whole person impairment of function utilizing the AMA Guides. Based upon a functional capacity evaluation, the doctor believes claimant should observe permanent restrictions of no lifting greater than fifty (50) pounds occasionally, no frequent lifting greater than twenty to thirty (20-30) pounds, no lifting greater than thirty-five (35) pounds on occasional basis from waist to overhead, and no frequent lifting greater than fifteen to twenty (15-20) pounds from waist to overhead. Dr. Ozanne further believes claimant should be restricted from repetitive pushing, pulling, and gripping. In September 1992, claimant presented to Boeing his release and restrictions from Dr. Ozanne and was immediately laid off.

The parties presented the testimony of two labor market experts. Claimant presented the testimony of Jerry D. Hardin, an experienced human resource and personnel consultant, who believes claimant has lost fifty-five to sixty percent (55-60%) of his ability to perform work in the open labor market utilizing the restrictions of Dr. Schlachter and fifteen-twenty percent (15-20%) utilizing the restrictions of Dr. Ozanne. Mr. Hardin also believes claimant has either lost fifty-nine percent (59%) or sixty-four percent (64%) of his ability to earn a comparable wage, depending upon which doctor's restrictions are utilized.

Respondent presented the testimony of Karen Crist Terrill, a vocational rehabilitation counselor and consultant. Ms. Terrill believes claimant has lost fifty-six percent (56%) of his ability to perform work in the open labor market using Dr. Schlachter's restrictions and ten percent (10%) using Dr. Ozanne's. She also believes claimant has lost thirty-five percent (35%) of his ability to earn a comparable wage, excluding consideration of fringe benefits.

The Administrative Law Judge averaged the percentages of loss opined by both labor market experts and concluded that claimant had lost thirty-five percent (35%) of his ability to perform work in the open labor market. The Administrative Law Judge also concluded that claimant lost forty-seven percent (47%) of his ability to earn a comparable wage based upon the expert opinions provided. The forty-seven percent (47%) approximates the average of the experts' opinion of loss. After reaching those conclusions, the Administrative Law Judge applied the analysis of work disability encompassed in the opinion of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), and concluded claimant sustained a forty-one percent (41%) work disability. Because the Appeals Board agrees with the analysis of the Administrative Law Judge, the Award should be affirmed. Respondent contends the Administrative Law Judge erred by failing to apply the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e. The Appeals Board disagrees. Claimant has not returned to work at a comparable wage since his release from Dr. Ozanne. Claimant has a high school education and work experience limited to the area of aircraft sheet metal assembly. He has conducted a job search with the help of a vocational rehabilitation vendor and has had no luck in obtaining employment paying comparable wage. Because claimant's injury and restrictions have significantly affected his ability to perform work in the open labor market and earn a comparable wage and because claimant has not returned to work at a comparable wage, the presumption of no work disability is not applicable.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated June 6, 1994, should be, and hereby is, affirmed.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Randy Schuhs, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety Co., for an accidental injury sustained on April 3, 1992.

The Claimant is entitled to 31 weeks temporary total disability at the rate of \$289.00 per week or \$8,959.00 followed by 384 weeks at \$211.84 or \$81,346.56 for a 41% permanent partial general body disability making a total award of \$90,305.56.

As of April 27, 1995, there would be due and owing to the claimant 31 weeks temporary total compensation at \$289.00 per week in the sum of \$8,959.00 plus 129 weeks permanent partial compensation at \$211.84 per week in the sum of \$27,327.36 for a total due and owing of \$36,286.36 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$54,019.20 shall be paid at \$211.84 per week for 255 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Barber & Associates	
Transcript of Preliminary Hearing	\$ 61.80
Deposition of Ernest R. Schlachter, M.D.	\$206.00
Transcript of Regular Hearing	\$195.95
 Ireland Court Reporting	
Deposition of Jerry D. Hardin	\$228.40
 Deposition Services	
Deposition of Karen Crist Terrill	\$150.40
Deposition of Stephen Ozanne, M.D.	\$169.00

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Vaughn Burkholder, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Directork